

\*E-Filed 7/16/12\*

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

MARVIN R. GORDON,

No. C 11-3593 RS (PR)

Plaintiff,

**ORDER OF SERVICE;**

v.

**DIRECTING DEFENDANTS TO FILE  
DISPOSITIVE MOTION OR NOTICE  
REGARDING SUCH MOTION;**

MATTHEW CATE, et al.,

Defendants.

**INSTRUCTIONS TO CLERK**

**INTRODUCTION**

This is a federal civil rights action filed pursuant to 42 U.S.C. § 1983 by a *pro se* state prisoner. The Court now reviews the first amended complaint pursuant to 28 U.S.C. § 1915A(a). Defendants are directed to file a dispositive motion or notice regarding such motion on or before October 12, 2012, unless an extension is granted. **The Court further directs that they are to adhere to the new notice provisions detailed in Section 10 of the conclusion of this order.**

**DISCUSSION**

**A. Standard of Review**

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.

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1 See 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and  
 2 dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may  
 3 be granted or seek monetary relief from a defendant who is immune from such relief. *See id.*  
 4 § 1915A(b)(1),(2). *Pro se* pleadings must be liberally construed. *See Balistreri v. Pacifica*  
 5 *Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988).

6 A “complaint must contain sufficient factual matter, accepted as true, to ‘state a claim  
 7 to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009)  
 8 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial  
 9 plausibility when the plaintiff pleads factual content that allows the court to draw the  
 10 reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (quoting  
 11 *Twombly*, 550 U.S. at 556). Furthermore, a court “is not required to accept legal conclusions  
 12 cast in the form of factual allegations if those conclusions cannot reasonably be drawn from  
 13 the facts alleged.” *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754–55 (9th Cir. 1994).  
 14 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements:  
 15 (1) that a right secured by the Constitution or laws of the United States was violated, and  
 16 (2) that the alleged violation was committed by a person acting under the color of state law.  
 17 *See West v. Atkins*, 487 U.S. 42, 48 (1988).

## 18 **B. Legal Claims**

19 Plaintiff alleges that defendants, officials and employees of Soledad State Prison and  
 20 the California Department of Corrections and Rehabilitation (“CDCR”), violated his  
 21 constitutional rights. His claims arise from a search of his cell which yielded contraband,  
 22 specifically two screwdrivers. According to the complaint, defendants charged him with  
 23 misconduct, found him guilty, reassigned him to different housing, and confiscated his  
 24 property. Plaintiff’s specific claims are that (1) defendants M. Lopp, S.E. Baumgardner, F.  
 25 Ramos, all correctional officers, retaliated against plaintiff in violation of his First and Eighth  
 26 Amendment rights; (2) Lopp, Baumgardner, Ramos, R. Martinez, and S. Caravello

1 overcharged plaintiff for a disciplinary offense in violation of due process; (3) Cate and  
2 R. Grounds were responsible for the overcharging; (4) Cate, Grounds, and Martinez have  
3 denied inmates the right to be heard prior to placement in segregated housing; (5) Cate and  
4 Grounds violated plaintiff's Eighth and Fourteenth Amendment rights by the inadequate  
5 housing he received; (6) Lopp, Baumgardner and Ramos violated his property interest;  
6 (7) Cate and Grounds failed to provide adequate oversight over the property deprivation  
7 process; (8) Cate and Grounds providing inadequate oversight allowed Lopp, Mensing, and  
8 Clavijo to falsify documents related to plaintiff's administrative proceedings; (9) Grounds  
9 violated his constitutional rights by placing him in an inappropriate housing classification;  
10 and (10) Grounds, Truett, and Mullen retaliated against him in violation of the First and  
11 Fourteenth Amendment. Liberally construed, these claims appear to be cognizable under  
12 § 1983.

### 13 CONCLUSION

14 For the foregoing reasons, the Court orders as follows:

15 1. The Clerk of the Court shall issue summons and the United States Marshal  
16 shall serve, without prepayment of fees, a copy of the amended complaint in this matter, all  
17 attachments thereto, and a copy of this order upon Matthew Cate, Director of the CDCR,  
18 R. Grounds, Warden at Soledad State Prison, and the following employees of Soledad:  
19 R. Martinez, S. Caravello, J. Mensing, F. Ramos, H. Clavijo, M. Lopp, S.E. Baumgardner, J.  
20 Truett, and P. Mullen. The Clerk shall also mail courtesy copies of the complaint and this  
21 order to the California Attorney General's Office.

22 2. No later than ninety (90) days from the date of this order, defendants shall file  
23 a motion for summary judgment or other dispositive motion with respect to the claims in the  
24 complaint found to be cognizable above.

25 a. If defendants elect to file a motion to dismiss on the grounds plaintiff  
26 failed to exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a),  
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1 defendants shall do so in an unenumerated Rule 12(b) motion pursuant to *Wyatt v. Terhune*,  
2 315 F.3d 1108, 1119–20 (9th Cir. 2003), cert. denied *Alameida v. Terhune*, 540 U.S. 810  
3 (2003).

4           b. Any motion for summary judgment shall be supported by adequate  
5 factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of  
6 Civil Procedure. Defendants are advised that summary judgment cannot be granted, nor  
7 qualified immunity found, if material facts are in dispute. If any defendant is of the opinion  
8 that this case cannot be resolved by summary judgment, he shall so inform the Court prior to  
9 the date the summary judgment motion is due.

10           3. Plaintiff's opposition to the dispositive motion shall be filed with the Court and  
11 served on defendants no later than forty-five (45) days from the date defendants' motion is  
12 filed.

13           a. In the event the defendants file an unenumerated motion to dismiss  
14 under Rule 12(b), plaintiff is hereby cautioned as follows:

15           The defendants have made a motion to dismiss pursuant to Rule 12(b) of the  
16 Federal Rules of Civil Procedure, on the ground you have not exhausted your administrative  
17 remedies. The motion will, if granted, result in the dismissal of your case. When a party you  
18 are suing makes a motion to dismiss for failure to exhaust, and that motion is properly  
19 supported by declarations (or other sworn testimony) and/or documents, you may not simply  
20 rely on what your complaint says. Instead, you must set out specific facts in declarations,  
21 depositions, answers to interrogatories, or documents, that contradict the facts shown in the  
22 defendant's declarations and documents and show that you have in fact exhausted your  
23 claims. If you do not submit your own evidence in opposition, the motion to dismiss, if  
24 appropriate, may be granted and the case dismissed.

25           b. In the event defendants file a motion for summary judgment,  
26 the Ninth Circuit has held that the following notice should be given to plaintiffs:  
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1           The defendants have made a motion for summary judgment by which they  
2 seek to have your case dismissed. A motion for summary judgment under Rule 56 of the  
3 Federal Rules of Civil Procedure will, if granted, end your case.

4           Rule 56 tells you what you must do in order to oppose a motion for summary  
5 judgment. Generally, summary judgment must be granted when there is no genuine issue of  
6 material fact — that is, if there is no real dispute about any fact that would affect the result  
7 of your case, the party who asked for summary judgment is entitled to judgment as a matter  
8 of law, which will end your case. When a party you are suing makes a motion for summary  
9 judgment that is properly supported by declarations (or other sworn testimony), you cannot  
10 simply rely on what your complaint says. Instead, you must set out specific facts in  
11 declarations, depositions, answers to interrogatories, or authenticated documents, as provided  
12 in Rule 56(e), that contradict the facts shown in the defendants' declarations and documents  
13 and show that there is a genuine issue of material fact for trial. If you do not submit your  
14 own evidence in opposition, summary judgment, if appropriate, may be entered against you.  
15 If summary judgment is granted in favor of defendants, your case will be dismissed and there  
16 will be no trial. *See Rand v. Rowland*, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff  
17 is advised to read Rule 56 of the Federal Rules of Civil Procedure and *Celotex Corp. v.*  
18 *Catrett*, 477 U.S. 317 (1986) (holding party opposing summary judgment must come forward  
19 with evidence showing triable issues of material fact on every essential element of his claim).  
20 Plaintiff is cautioned that failure to file an opposition to defendants' motion for summary  
21 judgment may be deemed to be a consent by plaintiff to the granting of the motion, and  
22 granting of judgment against plaintiff without a trial. *See Ghazali v. Moran*, 46 F.3d 52,  
23 53-54 (9th Cir. 1995) (per curiam); *Brydges v. Lewis*, 18 F.3d 651, 653 (9th Cir. 1994).

24           4. Defendants shall file a reply brief no later than fifteen (15) days after plaintiff's  
25 opposition is filed.

5. The motion shall be deemed submitted as of the date the reply brief is due. No hearing will be held on the motion unless the Court so orders at a later date.

6. All communications by the plaintiff with the Court must be served on defendants, or defendants' counsel once counsel has been designated, by mailing a true copy of the document to defendants or defendants' counsel.

7. Discovery may be taken in accordance with the Federal Rules of Civil Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or Local Rule 16-1 is required before the parties may conduct discovery.

8. It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the court informed of any change of address and must comply with the court's orders in a timely fashion. Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

9. Extensions of time must be filed no later than the deadline sought to be extended and must be accompanied by a showing of good cause.

10. A recent decision from the Ninth Circuit requires that *pro se* prisoner-plaintiffs be given "notice of what is required of them in order to oppose" summary judgment motions at the time of filing of the motions, rather than when the court orders service of process or otherwise before the motions are filed. *Woods v. Carey*, No. 09-15548, slip op. 7871, 7874 (9th Cir. July 6, 2012). **Defendants shall provide the following notice to plaintiff when they file and serve any motion for summary judgment:**

The defendants have made a motion for summary judgment by which they seek to have your case dismissed. A motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case.

Rule 56 tells you what you must do in order to oppose a motion for summary judgment. Generally, summary judgment must be granted when there is no genuine issue of material fact — that is, if there is no real dispute about any fact that would affect the result of your case, the party who asked for summary judgment is entitled to judgment as a matter of law, which will end your case. When a party you are suing makes a motion for summary judgment that is properly supported by declarations (or other sworn testimony), you cannot simply rely on what your complaint says. Instead, you must set out specific

1 facts in declarations, depositions, answers to interrogatories, or authenticated  
2 documents, as provided in Rule 56(e), that contradict the facts shown in the  
3 defendants' declarations and documents and show that there is a genuine issue  
4 of material fact for trial. If you do not submit your own evidence in opposition,  
summary judgment, if appropriate, may be entered against you. If summary  
judgment is granted, your case will be dismissed and there will be no trial.

5 *Rand v. Rowland*, 154 F.3d 952, 962–63 (9th Cir. 1998).

6 **IT IS SO ORDERED.**

7 DATED: July 13, 2012

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9 RICHARD SEEBORG  
10 United States District Judge  
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United States District Court  
For the Northern District of California

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